IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 13, 2001

HERSCHEL LEON COFFELT, JR. v. STATE OF TENNESSEE

Appeal from the Circuit Court for Franklin County
No. 5833 & 6588 Buddy D. Perry, Judge

No. M2000-01504-CCA-R3-CD - Filed June 15, 2001

The petitioner, Herschel Leon Coffelt, Jr., appeals the Franklin County Circuit Court's denial of his motion to re-open his post-conviction relief proceeding. His March 19, 1996 post-conviction petition challenged his guilty-plea based,1987 Franklin County conviction of selling marijuana. He received an incarcerative sentence of three years and a fine of $10,000 and did not appeal. On October 30, 1997, the lower court determined that the post-conviction petition was barred by the statute of limitations and dismissed it. *See* Tenn. Code Ann. § 40-30-202(a) (1997). The petitioner then filed affidavits of two persons who claimed to have been present during the drug transaction that resulted in the 1987 case. The affiants stated that the petitioner was not present when the offense was committed. Based upon their affidavits, the petitioner moved the lower court to reconsider its denial of the petition, but when his counsel appeared before the court to argue his motion, counsel asked the court to treat the motion as one to reopen the post-conviction proceeding. *See* Tenn. Code Ann. § 40-30-217 (1997). The lower court denied the motion, and the petitioner appealed. We conclude that the record supports the trial court's action, and accordingly, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, J.J., joined.

Joseph E. Ford, McBee & Ford, Winchester, Tennessee, for the Appellant Herschel Leon Coffelt, Jr.

Paul G. Summers, Attorney General & Reporter; Patricia C. Kussman, Assistant Attorney General; James Michael Taylor, District Attorney General; Steven Blount, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The petitioner claimed in his post-conviction petition, filed March 19, 1996, that his November 6, 1987 conviction judgment is infirm because he was hampered by the ineffective assistance of counsel and was "unlawfully" induced to plead guilty to selling marijuana, a Schedule VI controlled substance. The post-conviction court found the petition time barred and dismissed it on October 30, 1997. The petitioner then filed the affidavit of Ricky Hill. Hill claimed in this affidavit, which was dated October 23, 1997, that the prosecutor's statement of a factual basis for the petitioner's 1987 guilty plea incorrectly stated that the petitioner sold marijuana to Hill. The affidavit says that Hill never received marijuana from the petitioner and that the prosecutor's factual basis for the plea materially misstated the facts. Later, the petitioner filed the affidavit of Linda Summers, who was the petitioner's ex-wife. She stated in her May 23, 2000 affidavit that she was "present on the day that [the petitioner] was alleged to have sold marijuana [and the petitioner, on that date,] did not sell marijuana." She further stated that she witnessed "a sale between other individuals including agents of the State of Tennessee [and] at no time was [the petitioner] present . . . ." Finally, she said, "I provided documentation to two attorneys in Chattanooga . . . and ask[ed] that they file for post[-]conviction relief. . . ."

On November 13, 1997, the petitioner moved to have the post-conviction court reconsider the dismissal of his post-conviction petition, but when his counsel argued the motion, he asked the court to treat it instead as a motion to reopen his petition. During the arguments presented to the trial court on this motion, the petitioner's counsel stated that the transfer of documents to Chattanooga lawyers, as mentioned in Summers' affidavit, occurred in October, 1990.

The trial judge expressed his belief that the new facts raised by the petitioner did not avail him post-conviction relief because the facts alleged were not scientific in nature. *See* Tenn. Code Ann. § 40-30-202(b) (1997) (post-conviction petitioner can avoid statute of limitations if the "claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent"); *see also* Tenn. Code Ann. § 40-30-217(a)(2). The trial judge further opined that the relief the petitioner was attempting to claim was more properly addressed through the writ of error *coram nobis*, but he held that the writ was time barred because more than one year had elapsed from November 6, 1987, the date of judgment. *See* Tenn. Code Ann. § 27-7-103 (2000). The petitioner's counsel repeated his request that the trial court treat the post-hearing motion as a motion to reopen and said, "[T]his is not a Writ of Error Coram Nobis, this is in fact a motion to reopen . . . " The trial court denied the motion on May 30, 2000. The petitioner filed his notice of appeal to this court on June 15, 2000.

On appeal, the petitioner asserts for the first time that he was denied equal protection of the law because Tennessee Code Annotated section 40-30-217(a)(2), which provides for reopening of post-conviction cases, "classifies differently those persons who . . . produce scientific evidence [than it does] those who can produce other evidence."

The state argues that section 40-30-217(a)(2) does not impose an unconstitutional classification and that the trial court properly treated the motion to reopen as a petition for writ of error *coram nobis*, which is barred by a one-year statute of limitations.

After reviewing the parties' briefs, the record on appeal, and the applicable law, we conclude that the petitioner presented to the trial court a motion to reopen his 1996 post-conviction petition and that the lower court's denial of the motion should be affirmed.

This appeal is resolved by determining the nature of the proceeding before us. The inquiry is best approached by determining what is *not* before us.

Even though the petitioner has asserted claims of newly discovered facts, we decline to treat the proceeding below as an application for a writ of error *coram nobis*. We accept at face value the protests of petitioner's counsel that "this is not a writ of error *coram nobis*."

Moreover, we question whether the new facts asserted constitute bases for the writ. The assertions in the affidavits that the petitioner was not present during the specified drug transaction were obviously known to the petitioner at the time he pleaded guilty in 1987. The efficacy of the affidavits is not these assertions but rather the existence of witnesses to the transaction, whose existence or status as witnesses the petitioner may not have known (at least until 1990, when he and Summers attempted to communicate with Chattanooga lawyers). One must remember that the petitioner was not tried for his offense; rather, he pleaded guilty. One surmises that the utility of the "discovery" of these "witnesses" is that it suggests an unknowing or coerced guilty plea, that had he known that he had a general defense and a possibility of acquittal, he would have eschewed the plea and gone to trial.

It may well be, however, that this issue is only cognizable in a timely post-conviction proceeding. A writ of error *coram nobis* "will lie for subsequently or newly discovered *evidence* relating to matters *which were litigated at the trial* if the judge determines that such *evidence may have resulted in a different judgment, had it been presented at trial*." Tenn. Code Ann. § 40-26-105 (1997) (emphasis added). Moreover, the common law writ "alleged that because of something that never came before the court, 'it was a mistake to proceed to judgment at all.'" *State v. Mixon*, 983 S.W.2d 661, 667 (Tenn. 1999).[1]

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[1] We have considered whether the emergence of the witnesses should serve to challenge the accuracy of the prosecutor's statement of facts, upon which acceptance of the plea and ultimately the judgment of conviction were based. This argument presumably would be unavailing to the petitioner, who himself was present at the plea submission hearing and pleaded guilty to the offense as factually premised. A claimant to the writ must show that he was "without fault in failing to present [the] evidence at the proper time." Tenn. Code Ann. § 40-26-105 (1997).

Furthermore, in this vein, it is difficult to believe that the petitioner was without fault in discovering the "witness" status of Hill and Summers until 1996 or later. Apparently with the petitioner's knowledge, Summers presented at least some of the facts set forth in the affidavit to attorneys in October of 1990.

Next, we note that the petitioner has not attempted to appeal the dismissal of his March 19, 1996 petition for post-conviction relief. The June 15, 2000 notice of appeal was filed much later than 30 days after October 30, 1997, the date the order of dismissal was entered. *See* Tenn. Code Ann. § 40-30-216 (1997); Tenn. R. App. P. 4(a). The petitioner does not maintain that his November 13, 1997 motion to reconsider was effective to delay his deadline for filing his notice of appeal; instead, he continues to characterize it as a motion to reopen. Additionally, he has neither sought a waiver of the timely filing of a notice of appeal, *see* Tenn. R. App. P. 4(a), nor has he presented to this court any issues pertaining to the dismissal of the 1996 petition. Thus, in this appeal, the petitioner does not seek a review of the dismissal of the post-conviction petition.

Finally, the proceeding before us is not cognizable as an application for permission to appeal a motion to reopen a post-conviction proceeding, as the petitioner had intended. *See* Tenn. Code Ann. § 40-30-217 (1997). Even if we treat the motion as an adequate motion to reopen, the petitioner is required to file in this court, within ten days of the denial, an application seeking permission to appeal. Tenn. Code Ann. § 40-30-217(c) (1997). Even if we treat the notice of appeal as such an application, it was filed late. The order denying the motion was entered on May 30, 2000, and the notice of appeal was filed on June 15, 2000. Therefore, the proceeding before us is not an effective application for permission to appeal the denial of a motion to reopen a post-conviction proceeding.

Thus, we discern no basis for this proceeding in this court. Because the petitioner chose to characterize his motion below as a section 40-30-217 motion to reopen a prior post-

conviction proceeding,[2] and because the application for permission to appeal was not timely filed, we deny the application and affirm the action of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

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[2] The petitioner will no doubt discern that this treatment of his claim negates further any claim that he has sought a writ of error *coram nobis*. Because, at his urging, we have not treated this proceeding in this manner, we have not determined whether a 1997 application for the writ would have been time-barred via Code sections 40-26-105 and 27-7-103.

We note that in *Phillip R. Workman v. State*, — S.W.3d —, No. W2000-00774–SC-R11-PD (Tenn., Nashville, Mar. 30, 2001), filed on March 30, 2001, our supreme court held that, with Workman's imminent execution in the balance, due process required that the trial court examine the merits of Workman's application for writ of error *coram nobis* rather than summarily bar it through the one-year statute of limitations. *Id.*, — S.W.3d at —, slip op. at 2-4. It is clear in the supreme court's opinion that Workman's private interest in not being executed without an examination of the merits of his claim of newly-discovered evidence weighed heavily in the balance.

Although we do not know whether *Phillip R. Workman* portends any *coram nobis* opportunity for the present petitioner, and we by no means intimate that he can lay claim to a due process-based avoidance of the statute of limitations, we surmise that the positions of the parties below would likely have been reversed had *Phillip R. Workman* been decided previously. Nevertheless, we do not deem this an appropriate case for a remand for further proceedings in the trial court. From the record before us, we could not begin to know the weight of any interests which the petitioner might place in the balance, except we know that they are unlikely to be as weighty as were Workman's. Moreover, during the pendency of this case before the trial court and this court, the parties have not raised, argued, or briefed the avoidance of the *coram nobis* statute of limitations via due process.